

After reviewing the entire record, for preliminary hearing purposes the Appeals Board finds:

The preliminary hearing Order entered by the Administrative Law Judge should be affirmed.

The question whether claimant has established it is more probably true than not that he sustained personal injury by accident arising out of and in the course of his employment with the respondent is a difficult one. Claimant now admits that he is unable to exactly recall when he began to experience the low back pain that he associates with his alleged December 27, 1995 accident. However, the medical histories recorded by some of the health care providers that claimant consulted in early January 1996 relate claimant's low back pain to his work as an automobile technician.

The history recorded in the Wichita Clinic, P.A., dated January 5, 1996 indicates claimant had been having severe low back pain for the past several days. The notes also indicate that claimant did not have a history of recent injury although he did "lean over cars all day as he is an auto technician." Likewise, the history recorded in Dr. Ely Bartal's notes, dated January 17, 1996, indicated that claimant had been having back pain since December 27, 1995 and the pain "began while he was bending over a car."

The treatment notes that raise questions whether claimant's low back problems are related to his work appear in the records of his chiropractor, Dr. Curtis Wheeler. The scant history in those records, dated January 3, 1996, indicate that claimant had been experiencing increasing pain since awakening three to six days before. However, even Dr. Wheeler's limited history references the fact that claimant leans over cars while working.

For preliminary hearing purposes the Appeals Board agrees with the conclusion of the Administrative Law Judge that it is more probably true than not that claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent on or about December 27, 1995.

For preliminary hearing purposes the Appeals Board also agrees with the Administrative Law Judge that claimant gave respondent timely notice of accident as required by K.S.A. 44-520. Claimant testified that he told his employer the date he began to experience his low back pain in December that he was probably going to need to see a chiropractor. Again, on December 29, 1995 and January 3, 1996, claimant advised the respondent's owner, David Leivian, that he was experiencing back pain and was going to consult a doctor. Under this factual situation where claimant did not experience a sudden traumatic event, the statements given respondent were adequate to satisfy the notice requirements of K.S.A. 44-520.

The issue whether claimant is temporarily and totally disabled from engaging in any substantial and gainful employment and, thus, entitled to temporary total disability benefits is not subject to Appeals Board review at this juncture of the proceeding. Because it is not a preliminary hearing finding enumerated in K.S.A. 44-534a, as amended by S.B. 649 (1996), specifically made subject to Appeals Board review, nor a situation where the Administrative Law Judge has exceeded her authority, the Appeals Board lacks the jurisdiction to review that preliminary hearing finding until time of final award.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated April 24, 1996, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

c: Terry L. Pullman, Wichita, KS
Larry D. Shoaf, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director